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994181—52——1

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 601

ERIE FORGE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 27a–45a) is reported at 93 F. Supp. 192. The opinion of the Court of Appeals (R. 61–69) is reported at 191 F. 2d 627.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1951. (R. 70.) On December 14, 1951, Mr. Justice Burton ordered that the time for filing a petition for a writ of certiorari be extended to and including February 23, 1952. (R. 71.) The petition for a writ of certiorari was filed on February 21, 1952. The jurisdiction

of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the delinquency penalty for late filing of returns, provided by Section 291 of the Internal Revenue Code and measured by the excess profits shown on the taxpayer's returns, was validly assessed without first issuing the deficiency letter for which provision is made provided by Section 272 (a) of the Code.

2. Whether the Court of Appeals correctly held that the prior proceedings for the same tax years in the Tax Court did not estop the United States in this action.

STATUTES AND OTHER AUTHORITIES INVOLVED

These will be found in Appendix A, *infra*, pp. 13–25.

STATEMENT

This case was heard in the District Court on cross motions for summary judgment and the taxpayer's motion to dismiss. (R. 6a, 8a.) The facts (R. 3a–6a) are as follows:

This is a suit by the United States against Erie Forge Company, hereinafter called the taxpayer,[1]

[1] The term "taxpayer" is used for convenience although not accurate since the alleged liability is for delinquency penalties on excess profits imposed by the Act of March 27, 1934, c. 95, 48 Stat. 503, as amended, known as the Vinson Act. But Section 3 (b) of that Act (Appendix A, *infra*, pp. 13–14) provides that all provisions of law (including penalties) "applicable with respect to the taxes imposed by

a Pennsylvania corporation, seeking judgment in the amount of $68,517.63, together with interest, representing delinquency penalties assessed against the taxpayer by the Commissioner of Internal Revenue for the years 1935 to 1940, inclusive, because of the failure of the taxpayer to timely file excess profits returns required by the Act of March 27, 1934, c. 95, 48 Stat. 503, as amended, known as the Vinson Act.[2] (R. 27a–28a.) The assessed delinquency penalties are those measured by the excess profits shown on the taxpayer's reports. (R. 4a–5a).

The taxpayer is engaged in the manufacture of steel forgings, ingots, and castings. During the years involved in this action, it kept its books of accounts and made its Federal income tax returns on the basis of fiscal years ended April 30. During the fiscal years 1935 to 1940, inclusive, the taxpayer completed contracts made by it with the Secretary of the Navy, as a result of which it was required by the Vinson Act to file annual reports of profits on those contracts and subcontracts. The taxpayer made no report of the completion of the contracts actually completed during the fiscal years 1935 to 1940, inclusive, until April 30,

---

Title I of the Revenue Act of 1934, and not inconsistent with this section" are to be applicable with respect to the assessment, collection or payment of excess profits under that Act. The parties are in agreement that this case can be treated as if it were one for the collection of liability imposed by Chapter 1 of the Internal Revenue Code. (Pet. 2.)

[2] See fn. 1, *supra*.

1941, when, for the first time, it filed with the Collector of Internal Revenue at Pittsburgh the annual reports of profits required of it under the Vinson Act. (R. 28a.)

After these reports were filed, the Commissioner of Internal Revenue assessed the excess profits liability of $307,321.19 shown on the returns, together with interest of $20,848.69, a total of $328,169.88. This assessment was paid. (R. 5a, 28a.)

Because no reports were filed for the six years in controversy until April 30, 1941, the Commissioner, on August 30, 1941, also assessed a delinquency penalty measured by the amounts shown on the returns for each of the fiscal years in the following amounts (R. 5a):

Years ended April 30	*Amount of delinquency penalty*
1935	$284.82
1936	2,171.69
1937	3,563.33
1938	12,351.74
1939	16,895.35
1940	33,250.70
Total	$68,517.63

On September 9, 1941, notice of assessments totalling $68,517.63 was given to the taxpayer and demand then made for payment. On July 21, 1944, a further demand for payment of the same penalties was made. (R. 5a, 28a–29a.) Since no part of the $68,517.63 had been paid (R. 5a), this action was commenced on August 21, 1947, which was within six years of the assessment made on August 30, 1941. (R. 1a, 5a.)

On March 31, 1943, the Commissioner notified the taxpayer of his determination of deficiencies in excess profits for the years 1935 to 1940, inclusive, of $69,613.60 and a delinquency penalty thereon of $17,245.22. (R. 8a–9a.) On June 29, 1943, taxpayer filed a petition in the Tax Court to review the deficiency determination. In both its original and amended petitions, the taxpayer claimed that the assessed penalties of $68,517.63, the subject matter of this litigation, were erroneously asserted and were in controversy. (R. 9a.) The Commissioner's answer to the amended petition admitted that the taxpayer claimed the original penalties were erroneously asserted, but denied that they were in controversy before the Tax Court. (R. 14a.) Later the Commissioner sought to amend his answer to contend alternatively (1) that the penalties assessed on the original return in the amount of $68,517.63 were in controversy as the taxpayer had contended and (2) that pursuant to Section 272 (e) of the Code the delinquency penalties on the liability shown on the reports were increased deficiencies. (R. 16a–17a.) The motion was denied by the Tax Court. (R. 26a.) The Tax Court sustained the Commissioner's determination as to the deficiencies in excess profits of $69,613.60 and the penalties thereon of $17,245.22. (R. 25a–26a, 27.) These amounts have been paid and are not here in controversy. (R. 33a.) It refused, however, to consider the assessed penalties of $68,517.63, stating

that (R. 26a) "The foregoing discussion disposes of all of the issues which were properly presented for decision in this case." The Commissioner filed a petition for review by the Court of Appeals for the Third Circuit of the decision of the Tax Court, setting forth that the Tax Court had abused its discretion in refusing to permit the Commissioner to file its amended answer and to have the assessed penalties considered as additional deficiencies. (R. 33a–34a.) The Court of Appeals for the Third Circuit sustained the Tax Court. It stated in note four of its opinion [3] (167 F. 2d 71, 73) that "There was a controversy between the parties as to whether the original penalty was a deficiency or a part of the tax; since that item was not passed upon by the Tax Court and not argued on appeal, except by reference in a footnote, we mention it only in passing."

The District Court held that the delinquency penalties measured by the liability shown on the returns were required to be asserted by a deficiency notice. Accordingly, it held that the decision of the Tax Court, affirmed by the Court of Appeals for the Third Circuit, was a final determination adverse to the Commissioner of the collectability of these penalties. (R. 45a.)

The Court of Appeals for the Third Circuit reversed the District Court and remanded for fur-

[3] The reported opinion (167 F. 2d 71) was subsequently amended by the court. The order of amendment is printed in Appendix B, *infra*, pp. 26–27.

ther proceedings not inconsistent with its opinion (R. 61–69). It held that the delinquency penalties measured by the liability shown on the returns were not required to be asserted by a deficiency notice and accordingly were collectable by assessment without regard to the deficiency procedure. It also held that the prior proceeding for these years, which began in the Tax Court and was affirmed by the Court of Appeals, was not *res judicata* as to the present penalties not there in issue. (R. 64–65.)

ARGUMENT

1. The issue dispositive of all questions raised by the petition is whether the delinquency penalty provided in Section 291 of the Internal Revenue Code (Appendix A, *infra,* pp. 16–17) for late filing of returns, when measured by the tax shown on the return (as distinguished from the same penalty when measured by a deficiency as defined in Section 271 (a) (Appendix A, *infra,* pp. 14–15)), is itself a deficiency under Section 271 (a), as taxpayer contends. If such a penalty is a deficiency, the Commissioner was required to follow one of two procedures: (1) under Section 272 (a) (1) (Appendix A, *infra,* p. 15), to include the penalty in a ninety-day letter, which he did not do (R. 63); or (2) timely ask for an increase in deficiency in the Tax Court under Section 272 (e) (Appendix A, *infra,* p. 16), an action which the Court of Appeals (167 F. 2d 71), on the Commissioner's ap-

peal from the Tax Court proceeding, conclusively decided that he had not taken. If, however, as the court below held, the particular penalty is not a deficiency, there is no question at all that the restrictions on assessment imposed by Section 272 are inapplicable and the method of collection provided by the Code (the one employed here) is by direct assessment by the Commissioner,[3a] certified to the Collector,[4] who must within ten days give notice to the taxpayer and make demand for the payment thus assessed,[5] and if the assessment is timely[6] but unpaid, final collection may be effected by distraint or by a proceeding in court within six years after the assessment.[7]

2. As indicated, the key to this dichotomy in method of collection (deficiency procedure with a right to go to the Tax Court before assessment as distinguished from direct assessment) is whether the item in question is a "deficiency." The conclusion of the court below that the delinquency penalty measured by the self-returned tax is not a deficiency is unquestionably correct and there is no conflict of decisions.

[3a] Section 3640, Internal Revenue Code. That section provides that the Commissioner is required to make "assessments of all taxes and penalties imposed by this title * * * where such taxes have not been duly paid * * * at the time and in the manner provided by law."

[4] Section 3641, Internal Revenue Code.

[5] Section 3655, Internal Revenue Code.

[6] Section 275 (a) requires assessments to be made within three years after the returns were filed.

[7] Section 276 (c), Internal Revenue Code.

The result reached below is dictated by the clearest possible statutory language. Section 291, which imposes the very penalty at issue, states that it "shall be collected at the same time and in the same manner and as a part of the tax" but if, as here, the tax has been paid before discovery of the neglect, the penalty "shall be collected in the same manner as the tax." Since the tax by which this penalty is measured was the self-returned tax, collectable as outlined above by the direct assessment procedure, it inevitably follows that the phrase "same manner" requires collection of the penalty, too, by the direct assessment method. If the penalty had been measured by a deficiency in tax, the "same manner" is of course that used to collect deficiencies. The self-evident reason for two methods of collecting the same kind of penalty is that a redetermination of the tax, be it by way of a direct assessment or a deficiency, automatically requires a redetermination of the penalty. It is, therefore, logical and administratively desirable to permit the penalty to be redetermined by the same procedural route as the tax by which it is measured.

Taxpayer's argument to the contrary (Br. 25–31) has no merit. It is based largely, if not entirely, on the failure to distinguish between penalties measured by deficiencies and the penalty here measured by the tax shown on the return.

3. Even if the statute were less clear, the correctness of the result below is fully supported by

the long and undeviating administrative practice (Mim. 3374, V–1 Cum. Bull. 118 (1926) (Appendix A, *infra,* pp. 19–20); G. C. M. 24547, Feb. 7, 1945 (Appendix A, *infra,* pp. 20–25; letter of the Commissioner of Internal Revenue dated May 23, 1951 (Appendix C, *infra,* pp. 28–29), which, on familiar principles (***Estate of Sanford*** v. ***Commissioner,*** 308 U. S. 39, 52; see also ***United States*** v. ***Jackson,*** 280 U. S. 183, 193; ***United States*** v. ***Graham,*** 110 U. S. 219, 221), is entitled to great respect. This principle is especially germane to this peculiarly administrative problem.

The fact that since the origin of the modern Tax Court procedure in 1926, no taxpayer has ever seen fit to take the position that the taxpayer has here taken, itself strongly attests the reasonableness of the administrative construction and the understanding of the bar in accordance with the result reached below. At the minimum, it requires the conclusion that no grounds for further review here have been shown to exist.

4. We are in full agreement with taxpayer's point I (Br. 13–23), that the jurisdiction of the Tax Court once invoked is exclusive and its decision final with respect to a taxpayer's entire liability for each taxable period. But it is the taxpayer and not the United States which is making the collateral attack on the Tax Court's decision. The assessments were outstanding and valid when the taxpayer filed its petition for Tax Court redetermination. That action gave the Tax Court

jurisdiction over the entire liability for the years involved. Taxpayer sought expungment of the deficiencies and abatement of the assessment. (R. 63.) It obtained neither. (R. 27 (a).) It took no appeal. The decision of the Tax Court is final and estops taxpayer with respect to the merits of the penalty. That the Tax Court erroneously, perhaps, thought the original penalties were not in issue despite taxpayer's petition placing them in issue is immaterial. Its remedy was appeal. Also irrelevant here is the Commissioner's appeal limited to testing the timeliness of his attempt to treat the penalty as an additional deficiency. This was an alternative position—at all times made clear in the Tax Court and in the Court of Appeals (R. 16a, 64)—taken out of an abundance of caution. Taxpayer has no legal or even moral standing to feel aggrieved since it is plain that an appeal by it—at all times open—would have availed it nothing in any event. This is because it lost the penalty-measured-by-the-deficiency issue on the merits, and its failure to appeal from this decision indicates that it thought that it had no case on the merits in its own estimation with respect to the penalty measured by the self assessment, inasmuch as both penalties turned on the same issue of fact. Section 291, Internal Revenue Code.

The present action by the United States which taxpayer interprets as a collateral attack on the Tax Court's decision is, on the contrary, an action

in support of that decision. Taxpayer's assumption on which its entire point I is based is that the Commissioner has the burden, in the Tax Court, of pleading and obtaining approval of outstanding assessments of a self-returned tax. (Br. 20–22.) The assumption is not only without authority but is repugnant to the entire structure provided by the Code for the collection of the tax.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ELLIS N. SLACK,
Acting Assistant Attorney General.

LEE A. JACKSON,
IRVING I. AXELRAD,
Special Assistants to the Attorney General.

MARCH, 1952.

APPENDIX A

Act of March 27, 1934, c. 95, 48 Stat. 503 (Vinson Act) [as amended by the Act of June 25, 1936, c. 812, 49 Stat. 1926]:[8]

SEC. 3. * * * *Provided,* That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, of such contracts within the scope of this section as are completed by the particular contracting party within the income-taxable year, such amount to become the property of the United States, but the surety under such contracts shall not be liable for the payment of such excess profit: *Provided,* That if there is a net loss on all such contracts or subcontracts completed by the particular contractor or subcontractor within any income-taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding

[8] The Vinson Act was further amended by the Act of April 3, 1939, c. 35, 53 Stat. 555. Those amendments, however, are not material here and, accordingly, are not reproduced.

income-taxable year: *Provided further,* That if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the internal-revenue laws to collect Federal income taxes: *Provided further,* That all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury * * *: *And provided further,* That the income-taxable years shall be such taxable years beginning after December 31, 1935, except that the above provisos relating to the assessment, collection, payment, or refunding of excess profit to or by the Treasury shall be retroactive to March 27, 1934. (34 U. S. C. 1940 ed., Sec. 496.)

The following provisions of the Internal Revenue Code are applicable only to the fiscal years ending in 1939 and 1940. The Revenue Acts of 1934, c. 277, 48 Stat. 680; 1936, c. 690, 49 Stat. 1648, and 1938, c. 289, 52 Stat. 447, contained substantially the same provisions except where hereinafter noted.

Internal Revenue Code:

SUPPLEMENT L—ASSESSMENT AND COLLECTION OF DEFICIENCIES

SEC. 271. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which

the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.[9]

* * * * *

(26 U. S. C. 1946 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board

[9] Section 271, as here set out, is the section as amended in 1944, 53 Stat. 82. That amendment is applicable only to years beginning after 1942. The provision that is here strictly applicable is found at 52 Stat. 534 but, for present purposes, there is no substantial difference between the two versions.

has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(e) *Increase of Deficiency After Notice Mailed.*—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

* * * * *

(26 U. S. C. 1946 ed., Sec. 272.)

SUPPLEMENT M—INTEREST AND ADDITIONS TO THE TAX

SEC. 291.[10] FAILURE TO FILE RETURN.

In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per

[10] Section 291 of the Revenue Act of 1934 differed from the Code provision as set out above and from the Revenue Acts of 1936 and 1938 in that it provided for a flat penalty of twenty-five percent rather than as the Code provides for five percent for each thirty days not to exceed twenty-five percent in the aggregate.

centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612 (d) (1).

(26 U. S. C. 1946 ed., Sec. 291.)

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax * * *

(26 U. S. C. 1946 ed., Sec. 292.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section

292, relating to interest on deficiencies, shall not be applicable.

(*b*) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 1946 ed., Sec. 293.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT.

(a) *Tax Shown on Return.*—

(1) *General Rule.*—Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 294.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 322.)

V-1 Cum. Bull. 118:

SECTIONS 273 AND 274.—DEFICIENCY IN TAX.

Article 1231: Deficiency defined. V-5-2569
(Also Section 276, Article 1261) Mim. 3374

Revenue Act of 1924.

Tax on amended and delinquent returns not a deficiency.

TREASURY DEPARTMENT

OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., January 18, 1926.

To Collectors of Internal Revenue
and Others Concerned:

Your attention is invited to the definition of a deficiency in tax as set forth in section 273 of the Revenue Act of 1924.

It is held that the tax disclosed on an amended or delinquent return signed by a taxpayer does not constitute a deficiency within the meaning of section 273 of the 1924 Act. This is true, even though the amended or delinquent return was prepared by a collector or deputy collector, so long as it is signed by the taxpayer. It is further held that the 25 percent penalty added to the tax reported by the taxpayer on a delinquent return is not a deficiency within the meaning of the 1924 Act. Accordingly, 60-day letters should not be sent out in any of these cases.

* * * * *

C. R. NASH,
Acting Commissioner.

General Counsel's Memorandum 24547:[10]
Feb. 7, 1945

GC:I:OPV:TAS
A–396676

In re Additions to Tax for Failure to File Declaration of Estimated Tax Constitute Deficiencies

DEPUTY COMMISSIONER CANN:

Attention: Mr. Charles P. Suman, Head, Practice and Procedure Division

Reference is made to your memorandum (IT:P:XR VPC) dated December 23, 1944, with respect to whether the additions to the tax imposed on account of delinquency in payment or underestimation of estimated tax by Section 294 (d) of the Internal Revenue Code, as amended,

[10] This memorandum has not been printed in the Cumulative Bulletin.

constitute deficiencies within the meaning of Section 271 of the Code, as amended:

> In this connection you state:
>
> "In Mim. 3374 (C. B. V–1, 118 (1926)) it was held that the 25 per cent penalty added to the tax reported by a taxpayer on a delinquent return is not a deficiency. Consistent with that position, it has been the administrative practice of the Income Tax Unit to treat the delinquency penalty with respect to the tax reported by the taxpayer as not constituting a deficiency, but in the event the tax reported by the taxpayer is increased, the increase in penalty attributable to the increase in tax is treated as a deficiency.
>
> "This statement is made since you may wish to consider the provisions of section 291 of the Code (relating to additions to the tax for failure to file a timely return) in reaching a conclusion as to whether the additions to the tax provided in section 294 (d) are comparable. In other words, are the additions to the tax provided in section 294 (d) applicable to the tax reported by the taxpayer to be regarded as not deficiencies but any increase in such additions due to increasing the tax liability reported by the taxpayer to be regarded as deficiencies?"

Section 59 (d) of the Internal Revenue Code, as added by Section 13 (a) of the Individual Income Tax Act of 1944, declares that payment of the estimated tax shall be considered payment on account "of the tax for the taxable year," and that "Assessment in respect of the estimated tax *shall be limited to the amount paid.*" (Italics supplied.) Hence, any liability incurred by a

taxpayer under Section 294 (d) on account of delinquency with respect to the estimated tax, but which has not been paid, may not be assessed as a part of the estimated tax. If it is assessable at all, it must be assessed as a part of the tax imposed for the taxable year.

It will be noted that Sections 291, 292 and 293 of the Code deal respectively—

> (1) with addition to the tax for "failure to file returns", which addition is required to be "collected at the same time and in the same manner and as a part of the tax;"
>
> (2) with "interest on deficiencies", which interest is required to "be assessed at the same time as the deficiency;" and
>
> (3) with addition to a deficiency, which addition is required to "be assessed, collected, and paid in the same manner as if it were a deficiency."

Thus it will be seen that these sections prescribe in what manner the additions or interest referred to shall be assessed or collected. However, the ensuing Section 294 (d), *supra,* which relates to the additions imposed for delinquency in filing a declaration and making payment, or for substantial underestimation, of estimated tax, merely declares that such additions "shall be added to the tax." The statute stops there without providing when or in what manner such additions shall be assessed or collected. That the amount thereof may not be assessed or collected as a part of the estimated tax is clear from the specific provisions already noted, since assessment of the estimated tax is limited to the amount paid. The procedure to be followed, therefore, must be determined from such other signposts as may appear in the

context of that section, its general setting, and other provisions with which it is in *para materia.*

Section 294 bears the heading, "ADDITIONS TO THE TAX IN CASE OF NONPAYMENT." This heading would indicate that the section deals with amounts required to be added by the collector at the time of collection. The first subdivision (a) deals with amounts determined to be due by the taxpayer "as the tax imposed" by the Act, and provides that the addition therein referred to for failure to make timely payment "shall be collected as a part of the tax." The next subdivision deals with deficiencies or any additional amounts assessed in connection therewith and provides that if such amounts are not timely paid "there shall be collected as part of the tax, interest * * * from the date of such notice and demand" by the collector. Subdivision (c) merely provides that the provisions of subdivision (b) shall not be applicable to the class of cases therein referred to. Accordingly these subdivisions seem to fit in with the language contained in the heading and apparently contemplate that the additions referred to will be included in the notice and demand by the collector at the time of collection.

It is believed that a similar procedure may be followed with respect to the additions to the tax imposed by paragraphs (1) (A) and (1) (B) of subdivision (d) since such additions are also imposed for failure to make timely payment. The amount of the addition in each instance is 5 per centum of each installment due but unpaid, plus 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof

during which such amount remains unpaid. The maximum amount of the addition, however, may not exceed "10 per centum of the unpaid portion of such installment." Such additions may be included in the collector's notice and demand of original tax and upon the assessment thereof may be collected by distraint if necessary in the same manner as the additions to the tax imposed by subdivisions (a) and (b) of Section 294. Similarly, paragraph (d) (2) of the same section deals with additions to the tax to be collected because of substantial underestimation of the estimated tax, which estimation is required to be made solely for advance payment purposes. Accordingly, this addition too may be regarded as having been imposed for failure to make timely payment through underestimation. Hence it can be argued that this addition, consistent with the language of the heading of Section 294, is also imposed for nonpayment and that the statute contemplates that the amount thereof should be added by the collector at the time of collection. Of course, if any deficiency is later asserted, any increase in the additions to the tax should also be included in the deficiency notice.

However, it should be remembered that any such additions, although measured by the amount of the tax imposed, represent additions for delinquency or underestimation of the estimated tax and accordingly they are subject to the limitations contained in section 294 (d). *Cf.* G. C. M. 24435, in re Commerce Clearing House, Inc. (December 18, 1944).

The conclusions herein outlined are substantially in accordance with the conclusions reached

at a conference held in this office January 29, 1945, which was attended by representatives of your Unit and the Accounts and Collections Unit.

Accordingly, it appears that you may adopt substantially the same procedure with respect to the instant additions to the tax that you now follow with respect to the delinquency penalty imposed by Section 291 of the Code, as amended, and to which reference is made in paragraphs 2 and 3 of your memorandum.

Signed J. P. Wenchel,
R. H. D.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT—October Term, 1946

No. 9177

COMMISSIONER OF INTERNAL REVENUE, Petitioner

v.

ERIE FORGE COMPANY, Respondent

Present: GOODRICH and MCLAUGHLIN, *Circuit Judges,* and MURPHY, *District Judge.*

ORDER

AND NOW, to-wit, this 17th day of June, 1948, it is ordered that the opinion filed on March 9, 1948 in the above entitled case be and the same hereby is amended by striking out the first sentence on page 4, which reads, "The answer admitted the original penalties were erroneously asserted and denied that they were in controversy.", and by substituting in lieu thereof the following sentence: "The answer admitted that the taxpayer claimed that the original penalties were erroneously asserted and denied that they were in controversy." It is further ordered that the opinion filed on March 9, 1948, in the above entitled case be and the same hereby is amended by striking out the first sentence of the paragraph which begins on page 5 and reads: "The question for decision is, therefore, where abundant notice has been given to Commissioner's counsel that the notice of deficiency does not include penalties

previously assessed and instead of moving to amend and extend his claim, he admits they were erroneously assessed and insists that the burden of proving the penalties not included were properly asserted is upon the taxpayer, did the Tax Court abuse its discretion in denying leave to amend the answer when the request is first made after the testimony has been concluded and the taxpayer's brief pointing to Commissioner's error has been served upon him, and the only reason given for the delay is that the Commissioner upon further consideration decided the original penalties were in controversy and should be included?", and by substituting in lieu thereof the following sentence: "The question for decision is, therefore, where abundant notice has been given to Commissioner's counsel that the notice of deficiency does not include penalties previously assessed and instead of moving to amend and extend his claim, he insists that the burden of proving the penalties not included were properly asserted is upon the taxpayer, did the Tax Court abuse its discretion in denying leave to amend the answer when the request is first made after the testimony has been concluded and the taxpayer's brief pointing to Commissioner's error has been served upon him, and the only reason given for the delay is that the Commissioner upon further consideration decided the original penalties were in controversy and should be included?"

By the Court, HERBERT F. GOODRICH, *Circuit Judge.*

A true copy: Teste: *Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

APPENDIX C

MAY 23, 1951

Hon. J. HOWARD MCGRATH,
Attorney General,
Department of Justice,
Washington 25, D. C.

In re: *United States* v. *Erie Forge Company*

MY DEAR MR. ATTORNEY GENERAL: The issue presented in the above-entitled case now pending in the United States Circuit Court of Appeals for the Third Circuit is whether a delinquency penalty imposed by Section 291 of the Internal Revenue Code for late filing of returns and measured by the excess profits shown on the returns, may be assessed and collected without the issuance of a deficiency letter.

In view of the provisions of Section 291 of the Internal Revenue Code and of the provisions of the Revenue Acts antecedent thereto, it has been the position of the Bureau, where a delinquent return is filed reporting a tax and where there is no reasonable cause for late filing, that a penalty measured by the tax reported may be assessed and collected without the issuance of a deficiency letter.

In this connection see Mim. 3374, Cum. Bull. V–1, page 118, which provides, inter alia:

> It is held that the tax disclosed on an amended or delinquent return signed by a taxpayer does not constitute a deficiency within the meaning of section 273 of the

1924 Act. This is true, even though the amended or delinquent return was prepared by a collector or deputy collector, so long as it is signed by the taxpayer. It is further held that the 25 per cent penalty added to the tax reported by the taxpayer on a delinquent return is not a deficiency within the meaning of the 1924 Act. Accordingly, 60-day letters should not be sent out in any of these cases.

This mimeograph, so far as it related to amended returns, was revoked by Mimeograph 3428 dated May 24, 1926, Cum. Bull. V–1, page 119. However, the provision with reference to penalties on delinquent returns has been extant through the years and has not been modified.

So far as I have been able to ascertain there has been no authorized departure from this position in the actual practice of the Bureau.

Very truly yours,

(Signed) GEO. J. SCHOENEMAN,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1932